IN THE **HIGH COURT OF BOMBAY AT GOA**

CRIMINAL APPEAL NO. 13 OF 2004

Goa Handicrafts,
Rural & Small Scale
Industries Development
Corporation Ltd.,
having its Registered
and Head Office at
Crafts Complex, Neuginagar,
Panaji Santa Cruz Road,
Panaji, Goa 403 001 ... Appellants

versus

1. M/s Samudra Ropes Pvt. Ltd.,
   a company incorporated under
   the Companies Act, 1956 and
   having its registered office
   at Naik Building, 1st floor,
   Mariano Gracias Road,
   Margao-Goa 403 601.

2. Shri Narayan P. Naik,
   aged about 47 years,
   businessman, residing at
   H. No. 3, Costa Complex,
   Near Venusta Classic,
   Aquem-Alto, Margao-Goa,
   Managing Director of
   Respondent No. 1.

3. State of Goa. ... Respondents

Mr. V. A. Lawande, Advocate for the Appellant.

Mr. S. D. Lotlikar, Senior Advocate with Ms. Pooja Bharne, Advocate for Respondent Nos. 1 and 2.

Mr. S. N. Sardessai, Public Prosecutor for the State.

CORAM : V. M. KANADE, J.

DATE : 29TH JUNE, 2005.

ORAL JUDGMENT

The Appellant herein is the Original Complainant. He is challenging the Judgment and Order passed by the Ist Additional Sessions Judge, Panaji, who by his Order dated 5-9-2003 acquitted the Respondent/Accused for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881(Act, for short) and who by his Judgment and Order was pleased to set aside the Order passed by the Judicial Magistrate, First Class, Panaji, who had convicted the Accused under Section 138 of the said Act.

2. The brief facts which are relevant for the purpose of deciding this Criminal Appeal are as under:-

The Complainant is a Company registered under the Companies Act and its registered Office is at Panaji, Goa. The Accused No. 1 is also a Private Limited Company having its Office at Margao, Goa and the Accused No. 2 is the Managing Director of Accused No. 1 which admittedly is under the control of Respondent No.2 and its day to day management. The Accused had issued a post dated cheque dated 29-12-1999 for an amount of

Rs.10,00,000/- in favour of the Complainant drawn on Saraswat Co-operative Bank Ltd. towards the discharge of liabilities of Accusd No. 1 in respect 3 of the materials taken by them on credit from the Complainant. This cheque was deposited by the Complainant with their bankers. However, the said cheque was returned by the said Bank with an endorsement "exceeds arrangement". The Complainant thereafter issued a legal statutory notice dated 16-3-2000. However, the Accused did not give any reply to the said notice nor payment was made by the Accused within 15 days from the receipt of the said notice. The Complainant, therefore, filed a complaint under Section 138 of the said Act. Process was issued by the Magistrate on the said complaint after the statement of Sadashiv Shirodkar was recorded in verification of the complaint. The trial Court convicted the Respondent/Accused under Section 138 of the said Act and sentenced him to undergo imprisonment till rising of the Court and further directed him to pay compensation of Rs.10,00,000/- and in default of payment of compensation to undergo 6 months Simple Imprisonment. Against the said Order, the Accused preferred an Appeal before the Sessions Court being Criminal Appeal No. 78 of 2002. The Additional Sessions Judge, Panaji, by his Judgment and Order dated 5-9-2003 set aside the Order passed by the Magistrate and allowed the Appeal and acquitted the Accused of the offence punishable under Section 138 of the said

Act. Against the said Order, the Original Complainant has filed this Appeal against acquittal.

3. Submissions:

The learned Counsel appearing on behalf of the Appellant has submitted that the Additional Sessions Judge has erred in coming to the conclusion that there was no existing debt or liability and had further erred in relying on a Judgment in the case of **R. Sreenivasan** v. **State of Kerala and anothe**r (2002 Vol. II Company cases) and in the case of **Shri Taherr Khambati** v. **M/s Vinayak Enterprises** (1995 Cr. L. J. 560) and the same had been overruled by subsequent Judgment of the Supreme Court. He submitted that the lower appellate Court had failed to take into consideration that the Complainant in his cross-examination had clearly admitted that there was an existing debt and liability payable to the Complainant and that the cheque was issued for discharging the said liability. He submitted that, therefore, the findings of the Sessions Court was perverse to the extent that he did not take into consideration the specific admission given by the Accused in his cross-examination. He further submitted that the Sessions Court had clearly erred in coming to the conclusion that the trial Court had only considered the point whether the said cheque was isued by way of security. He submitted that the trial Court in fact had considered the evidence adduced by the Complainant and the admissions which were

given by the Accused in its totality and thereafter had given a specific finding that the cheque was issued towards the existing debt and legally enforceable liability. The learned Counsel appearing on behalf of the Appellant further invited my attention to a number of Judgments of the Supreme Court and to Judgments of this Court and various other High Courts in support of his submissions firstly on the point that even if the cheque was issued under security even then it would attract the liability under Section 138 of the said Act. In support of this submission, he relied on a Judgment of the Supreme Court in the case of **ICDS Ltd.** v. **Beena Shabeer and another** ((2002) 6 SCC 426) . He also relied on a Judgment of the Kerala High Court in the case of **Gopi, s/o Vasudevan** v. **Sudarsanan, s/o Chackrapani and another** (2002 CRI, L. J. 4194). He also relied on a Judgment of the Madras High Court in the case of **Palraj** v. **Lalchandh** ((2001) 103 Com. Cases 527) and on a Judgment of the Madras High Court in the case of **M/s. Alsa Constructions and Housing Limited and another** v. **M. Mal Reddy** (1999 CRI. L. J. 2743). He further submitted that even if the amount mentioned in the cheque was larger than the liability even then the penal provisions under Section 138 of the said Act were attracted. In support of the said submissions he relied on a Judgment in the case of **Kochayippa** v. **Suprasidhan** (2002 CRI. L. J. 4803) and in the case of **Andhra Engineering Corporation** v. **TCI Finance Ltd.** (1999 DCR 130). He also relied on another Judgment of the Kerala High Court in the case of **R. Gopikuttan Pillai** v. **Sankara Narayanan Nair** (2004 (1) DCR 222). The learned Counsel also sought to distinguish the Judgments on which reliance was placed by the Additional Sessions Judge.

He further submitted that it was the burden of rebutting the presumption which is raised under Section 139 of the said Act which was squarely on the Accused and the said burden had to be discharged by leading cogent evidence. In support of the said submission, he relied on a Judgment of the Supreme Court in the case of **K. N. Beena** v. **Muniyappan and another** ((2001) 8 SCC 458). He further submitted that a mere disability of the Accused to pay the amount would not absolve him from his liability under Section 138 of the said Act. In support of the said submission he relied on a Judgment of the Supreme Court in the case of **Punkaj Mehra** v. **State of Maharashtra** (2000 (2) SCC 756). He further submitted that pendency of the proceedings before the BIFR did not in ex post facto file a complaint under Section 138 of the said Act. In support of the said submission, he relied on a Judgment of the Supreme Court in the case of **Kusum Ingots & Alloys Ltd.** v. **Pennar Peterson Securities Ltd. and others** ((2000) 2 SCC 745). He further submitted that the provisions of Section 138 to Section 142 had to be construed in such a manner that the mischief which was sought to be remedied by the said provisions would not render. In support of the said submission regarding the object of Section 138 to Section 142 he relied on a Judgment of the Supreme Court in the case of **Modi Cements Ltd.** v. **Kuchil Kumar Nandi** ((1998) 3 SCC 249) and also in the case of **Dalmia Cement (Bharat) Ltd.** v. **Galaxy Traders & Agencies Ltd. and others** ((2001) 6 SCC 463) and also in the case of **Goa Plast(P) Ltd.** v. **Chico Ursula D'Souza** ((2004) 2 SCC 235) and in the case of **M/s. Alsa Constructions and Housing Limited and another** v. **M. Mal Reddy** (1999 CRI. L. J. 2743). He further relied on two recent

Judgments of the Kerala High Court in the case of **M/s. General Auto Sales** v. **D. Vijayalakshmi** (2005(3) ALL MR (JOURNAL) 6) and in another case in **Assoo Hajee** v. **K. I. Abdul Latheef and another** (2005(3) ALL MR (JOURNAL) 21) and in another in support of his submission that the prosecution for the dishonour of the cheque was maintainable eventhough the cheque was given by way of security.

4. The learned Counsel also invited my attention to the evidence adduced by the Complainant and the Accused had admitted in the correspondence between the parties that the amount was due and payable to the Complainant. He further invited my attention to the correspondence which was brought on record in the cross-examination of the Complainant and also the correspondence which was brougtht on record by the Accused which clearly indicated that the Accused had admitted his liability towards the Complainant and had asked for time to make the payment of the said liability. The learned Counsel submitted that neither the Accused had discharged the burden which was imposed by virtue of Section 139 of the said Act nor had shifted the burden by leading evidence which was raised by Section 139 of the said Act.

5. He also submitted that the Apex Court had held that if compensation was not paid the trial Court could impose a sentence in default of payment of compensation. In support of the said submission he relied on a Judgment of the Supreme Court in the case of **Hari Singh** v. **Sukhbir Singh and others** ((1988) 4 SCC 551) which was followed by

the Supreme Court Judgment in the case of **Suganthi Suresh Kumar** v. **Jagdeeshan** (AIR 2002 SC 681). He also relied on a Judgment in the case of **K. Bhaskaran** v. **Sankaran Vaidhyan Balan and another** ((1999) 7 SCC 510 and also followed by the Madras High Court in the case of **Y. Sreelatha @ Roja** v. **Mukanchand Bothra** (2002 (2) Crimes 19).

6. The learned Counsel appearing on behalf of the Respondents submitted that the scope for interference by the High Court while exercising its jurisdiction under Section 378 of the Code of Criminal Procedure was very limited. He submitted that it is a settled law that if two views are possible and the lower appellate Court has taken a particular view the High Court should not substitute its own view to the view taken by the lower appellate Court in an Appeal against acquittal. He further submitted that only in cases where it is shown that the Judgment and Order of the lower appellate Court acquitting the Accused was perverse or unreasonable the finding in such cases may be interfered with by the High Court. He submitted that in the present case, a specific case of the Accused was that there was no existing debt and liability towards the Complainant and that the said cheque which was issued by the Accused was only as a security and the cheque was not meant to be acted upon. He submitted that the Accused had rebutted the presumption which was raised under Section 139 of the said Act by bringing on record various documents by corresponding the Complainant and also had examined himself and had proved and rebutted the presumption which was raised under Section 139. He submitted that the presumption which

was raised under Section 139 was not a presumption which had to be rebutted beyond reasonable doubt but was required to be rebutted on the touchstone of preponderance of probability. He submitetd that the Accused had by bringing the evidence on record rebutted the presumption on preponderance of probability. He submitted that the offence under Section 138 was in a sense a technical offence and if the Accused was in a position to rebut the presumption regarding the existing debt or liability he was entitled to be acquitted. He further submitted that what was envisaged by the provisions of Section 138 of the said Act was that a cheque which was issued in respect of a debt for an amount mentioned in the cheque if had returned dishonoured that alone would attract the given provision as envisaged under Section 138 of the said Act. He also invited my attention to the cross-examination of P.W.1, Sadashiv Shirodkar and also the documents which were admitted by the prosecution witness which clearly supported the case of the Accused that the arrangement between the Accused and the Complainant was that the cheque would be given by way of security and subsequently the amount given and payable to the Complainant or its Principle, namely the ICPL would be paid by Demand Drafts and the cheque would be returned to the Accused by the Complainant and if the amount due was not paid by the Accused during the period of validity of the cheque a fresh cheque in the place of the old cheque which was issued would be handed over to the Complainant by the Accused. He submitted that at no point of time prior to the issuance of the cheque in question any payment had been made by the Accused by cheque.

7. He submitted that the Additional Sessions Judge had correctly distinguished the Judgment in the case of **ICDS Ltd.** v. **Beena Shabeer and another**(supra) and had correctly relied on the two Judgments referred in para 8 of the Judgment of the Additional Sessions Judge.

8. **Findings and Conclusion:**

In order to appreciate the rival contentions, it would be first essential to take into consideration the factual position. In the present case, the Complainant in para 3 of the complaint has averred that the Accused had issued a post dated cheque dated 29-12-1999 for an amount of Rs.10,00,000/- in favour of the Complainant towards the materials taken by the Accused on credit from the Complainant. The Complainant examined P.W.1, Sadashiv Shirodkar, who has given the details regarding the issuance of the cheque and thereafter the deposit of the said cheque by the Complainant and the subsequent dishonour of the cheque which was followed by the issuance of statutory notice and the filing of the complaint. P.W.1, Shirodkar, has been cross-examined at length by the Accused. In the cross-examination, P.W.1, Shirodkar, has stated that the Complainant is an authorised representative of IPCL which manufactured the raw materials. He has further admitted that the business transaction between the Accused and the Complainant were going on for a long time and that the Accused used to lift the materials from the Complainant and issue a cheque for the price of the said materials and in rare cases he used to give cheques as security and thereafter the Accused made

payment by way of Demand Draft and at that time the cheque was returned to the Accused. Further in cross-examination initially he has stated that the cheque was issued towards the payment of amounts due for the materials supplied vide Invoices dated 23-7-98, 1-1-99 and 3-2-99. Thereafter, this witness had admitted that the Accused had a running account with the Complainant and, therefore, he could not precisely say that the said cheque was issued towards the payment of these Invoices. The Invoices were thereafter brought on record through this witness. Thereafter, this witness was shown letter dated 29-5-1999 which he admitted was a letter which was issued by the Accused at the time of supply of the materials. In this letter, it is stated by the Complainant that the Accused had availed credit of Rs. 9, 95, 061/- and two cheques dated 28-12-1998 and 2-2-1999 drawn on Saraswat Co-operative Bank. It was further stated that the interest on the said amount was Rs.69,037.56 and, therefore, the Accused was directed to pay an amount of Rs. 10,64,098.56. Thereafter, a letter dated 25-8-1999 which was issued by the Complainant's Manager was shown to this witness in which the Accused was requested to pay an amount of Rs.11,15,168.00. P.W.1, Shirodkar, had thereafter admitted in his cross-examination that after this letter at Exh. 18 dated 25-8-1999 the Accused had made a payment of Rs. 2,50,000/- dated 8-9-1999 along with a covering letter dated 6-9-1999. Thereafter, this witness was shown letter dated 29-12-1999 issued by the Accused to the General Manager of the Complainant-Company. This witness admitted having received this letter and was exhibited as Exh. 19. The said letter reads as under:-

> "Enclosed please find cheque bearing No. 127766 dated 29/12/99 drawn on The Saraswat Co-op. Bank Ltd., Margao for Rs. 10,00,000/- (Rupees Ten Lakhs only) to be kept with you as a security towards our outstanding bill amounting to Rs. 8,00,000/- (Rupoees Eight Lakhs only). As we are expecting fund any moment, we will clear your dues any moment".

9. The cheque in question was, therefore, sent along with this covering letter at Exh. 19. P.W.1, Shirodkar, further admitted in his cross-examination that after this letter was returned the Accused had made further payment of Rs. 1,25,000/-. He further admitted that the cheque in question dated 29-12-1999 was issued since the earlier cheque dated 8-7-1999 was likely to lapse as the validity period was to expire in the following month. P.W.1, Shirodkar, has admitted the contents of the letter dated 29-12-1999 at Exh. 19. This witness was thereafter shown letter dated 19-1-2000 which was issued by the Complainant in which it was stated that the amount which was due from the Accused was Rs.7,80,000/-. This witness was thereafter shown letter dated 9-2-2000 wherein the Accused had asked for time to make final payment and the said letter was marked Exh. 20. He was further shown letter dated 17-2-2000 issued by the Managing Director of the Complainant-Company which he admitted was issued by the Complainant and by the said letter time was granted to the Accused upto 29-2-2000. From the cross-examination of this witness, it can be seen that P.W.1, Shirodkar,

had admitted that the Accused had a running account in the Company and that it was the practice which was followed by the Complainant and the Accused that the Accused would issue a cheque to the Complainant-Company and the said cheque would be returned after the Demand Draft was issued by the Accused and that the cheques which were issued by the Accused would be returned. From this evidence, it can further be seen that the cheque in question for an amount of Rs. 10,00,000/- was not necessarily issued towards the payment of Invoices dated 23-7-1998, 1-1-1999 and 3-2-1999 which is clear from the admission given by P.W.1, Shirodkar in his cross-examination. Another aspect which is brought on record by the Accused in his cross-examination is that initially the Accused had issued a cheque dated 8-7-1999 for an amount of Rs. 10,64,098.56 and after the validity of the said cheque was going to expire a fresh cheque dated 29-12-1999 was issued by the Accused in lieu of the earlier cheque. Thus, from the evidence of P.W.1, Shirodkar and his admission in the cross-examination, it has been established by the Accused that the cheque dated 29-12-1999 was given to the Complainant and that there was a specific understanding that the said cheque was not meant to be deposited in the Bank. Further, from the evidence of P.W.1, Shirodkar, in his cross-examination it has been established by the Accused that after the said cheque was issued dated 29-12-1999 an amount of Rs.2,50,000/- and Rs. 1,25,000/- had been paid. This fact has been admitted by P.W.1, Shirodkar. Further from the covering letter dated 29-12-1999 which was issued along with the cheque it was clearly mentioned that the cheque was to be kept as a security towards the

outstanding payment amounting to Rs.8,00,000/- which subsequently was reduced to Rs.7,80,000/- as per letter at Exh. 19 AA. In my view, therefore, by virtue of the admissions given by P.W.1, Shirodkar, in his cross-examination it has been established by the Accused that the said cheque of Rs.10,00,000/- was not meant to be acted upon as on earlier occasions the cheques which were issued by the Accused were returned when payment was made by Demand Draft or by cash and amount of cheque did not represent the actual amount which was due and payable to the Complainant as on the date on which the cheque was issued in favour of the Complainant because the Accused had a running account with the Complainant and the amounts were paid from time to time and they were adjusted as per the amount which were due and payable at the foot of the account of the Accused and the cheque, therefore, was retained possibly with a clear understanding that it would never be deposited in the Bank.

10. The Accused in support of his case has examained himself as D.W.1. He has also reiterated the same state of affairs as has been stated by P.W.1, Shirodkar, in cross-examination. D.W.1, Naik, in his evidence has stated that the raw materials which were required by Accused No. 1/Company were purchased from the Complainant and they were manufactured by M/s IPCL and at the time of supply of the materials by the Complainant the Accused used to deposit cheques with the Complainant equivalent to the value of the raw materials supplied and thereafter the Accused used to submit Demand Draft of the value of the

materials supplied in the name of M/s IPCL and thereafter the Complainant used to return cheques deposited with them. He has further stated that the two cheques dated 20-12-1998 and 2-2-1999 were drawn in the name of the Complainant and they were deposited by the Accused with the Complainant as security till the Demand Draft equivalent to the amount due was supplied to M/s IPCL. He has further stated that since the validity of the cheque was to expire the Complainant insisted on issuing a fresh cheque dated 9-7-1999. The Complainant has further stated that he paid an amount of Rs.1,50,000/- on 25-8-1999 and another payment of Rs. 2,50,000/- was made on 6-9-1999. The Complainant produced the Demand Draft which was issued by the Saraswat Co-operative Bank for an amount of Rs. 1,50,000/- in favour of M/s IPCL dated 18-10-1999 which has been exhibited as Exh. DW1/A. The stand, therefore, taken by the Accused in his examination-in-chief is inconsistent with the questions which were answered by P.W.1, Shirodkar in cross-examination.

11. The Accused was cross-examined at length and he has admitted the contents of letter dated 29-12-1999 in which the Accused had stated that their Company had outstanding dues towards the Complainant. He also admitted that the said cheques were issued towards the said dues towards the Complainant and had nothing to do with the IPCL. He also admitted that after the cheque was dishonoured the Complainant had issued a demand notice. He also admitted that on 15-11-2000 he had sought 3 months time to make the payment and

that he had issued a cheque dated 11-4-2001 for Rs. 75,000/- which was also dishonoured after it was deposited by the Complainant. He has further stated that though in his statement which was recorded earlier he had stated that their dues were in the range of approximately Rs.5,00,000/-. He admitted that along with interest the dues would be above Rs.8,00,000/-.

12. In my view, the admissions which are given by the Accused cannot be read in isolation and would have to be read in the context in which these admissions are made. The specific case of the Accused as stated by him in his examination-in-chief and in the cross-examination of P.W.1, Shirodkar, has been that there was an arrangement between the Complainant and the Accused. A cheque would be issued to the Complainant by way of security and which cheque was not supposed to be deposited in the Bank by the Complainant and that payment was made from time to time by the Accused through Demand Drafts and after such payments being made the cheques issued by the Accused were returned and if the payment which was due had not been made within the period of validity of cheque issued by the Accused a fresh cheque would be issued by the Accused in favour of the Complainant in lieu of the cheque the validity of which was about to expire. The admission, therefore, of the Accused that certain amounts were due and payable to the Complainant, therefore, cannot be used out of context to mean that the cheque in question was issued towards the payment of the said liability or dues. The trial Court, in my view, has clearly erred in relying on these admissions without

taking into consideration the context in which these statements had been made by the Accused. On the contrary, the manner in which evidence has been given by the Accused shows that he had been forthright and had not given any evasive replies and had stuck to his case as put up by him in the cross-examination of the Complainant's witness. The case of the Accused that payment was made by Demand Draft to IPCL from time to time also has been established by production of Certificate at Exh. DW1/A which was a true copy of the Voucher dated 18-10-1999.

13. In the light of this factual position, it will now have to be seen whether the case as made out by the Complainant attracts the penal provisions of Section 138 of the said Act.

14. In order to find out whether the penalty as envisaged under Section 138 r/w Section 141 of the said Act is atracted or not it will be essential to take into consideration the relevant legal provisions. Section 138 and Section 141 read as under:-

> **Section 138. Dishonour of cheque for insufficiency, etc. of funds in the account.--** Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that amount for the discharge, in whole or in part, of any debt or other liability, is returned by

the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless--

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque within thirty days of the receipt of information by him from the

bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.-- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

15. Section 138, therefore envisages that if a cheque is drawn in favour of a payee or a holder in due course towards the existing debt or other liability if it is dishonoured then in that case the drawer of the cheque and in the event the drawer of the cheque is a Company the persons who are in charge of the affairs of the Company would be liable if after the dishonour of the cheque and after the receipt of a statutory notice issued by the payee or holder in due course such a drawer does not make payment within 15 days which has now been amended to one month from the receipt of the statutory notice. The penal provision is attracted on non payment of the demand made by the payee or holder in due course and a presumption is raised for the existence of the debt or liability under the provisions of Section 139 of the said Act. It would be relevant also to refer the provisions of Section 139 which reads as under:-

> **Section 139 - Presumption in favour of holder.-** It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, or any debt or other liability".

16. A combined reading of Sections 138, 141 and 139 clearly indicates that the initial burden on the Complainant is merely to show that the cheque had been drawn by the drawer of the cheque in favour of the Complainant who may be the payee or holder in due course and that such cheque which was issued by the drawer had returned on account of dishonour of the cheque by the Bank and that he had taken further steps of issuing a demand notice and that after the receipt of the demand notice the Accused namely the drawer or other persons as envisaged under Section 141 had failed to make the payment. The initial burden, therefore, of the Complainant would stand discharged after these aspects were proved by him and thereafter as a result of the presumption raised under Section 139 it would be the duty of the Accused to rebut the presumption which is raised under Section 139 of the said Act by showing that the cheque in question was not issued towards a legally enforceable existing debt or other liability. It is now been held by a catena of Judgments of the Supreme Court and various High Courts that the presumption which is raised under Section 139 has to be rebutted by the Accused or preponderance of probability and not beyond reasonable doubt. The rebutting of presumption, therefore, under Section 139 would mean that if the Accused was in a position to bring on record either by

soliciting answers from the prosecution witness in their cross-examination and or by bringing such documentary evidence on record in the cross-examination of the prosecution witnesses and or by examination of his own witnesses such evidence which would indicate that the said cheque was not issued to fulfil an existing debt or liability Section 138 would not be attracted. The word existing debt or liability also has been interpreted to mean the debt which existed on the date on which the alleged cheque was issued.

17. From the above discussion, it can be seen that all that the Accused is required to show is that the cheque either was issued not for any liability as for example when it is issued for the purpose of giving a donation or for a purpose which is illegal and not enforeable etc.

18. In my view from the discussion of the evidence adsduced by both parties it will have to be held that the Accused has successfully rebutted the presumption raised under Section 139 of the said Act in view of the clear admission givern by P.W.1, Shirodkar in his cross-examination which is consistent with the stand taken by the Accused in his examination-in-chief. The cheque given by the Accused was, therefore, never meant to be deposited but was referred only as a sort of collateral security. This is clear from the evaluation of the evidence in paras 7 to 11 above. Such a cheque in my view would not entail the penal liability as envisaged under Section 138 of the said Act if it is deposited and is dishonoured. Secondly, from the aforesaid

discussion, it can also be seen that the cheque in question was not given for an existing debt or legally enforceable liability.

19. In the background of this factual and legal position, it has to be seen whether the ratio of the various Judgments on which reliance is placed by the learned Counsel appearing on behalf of the Appellant is applicable to the facts of the present case. The learned Counsel has further relied on a Judgment in the case of **Kusum Ingots & Alloys Ltd.** v. **Pennar Peterson Securities Ltd. and others**(supra) and has submitted that merely because proceedings are pending before the BIFR that by itself would not create any bar in executing proceedings under the provision of Section 138 of the said Act. He submitted that admittedly in the present case the proceedings under the BIFR have been prosecuted after the cheque has been dishonoured and even otherwise there was no bar for instituting a criminal complaint under Section 138 of the said Act. There cannot be any dispute in regard to the proceedings laid down in the case of **Kusum Ingots & Aloys Ltd.** v. **Pennar Peterson Securities Ltd. and others**(supra). In the said case, the Apex Court has observed that only in certain situations and circumstances in a case in which BIFR has submitted its report declaring a company as "sick" and had also issued a direction under Section 22-A only in the limited category of cases it would be possible to argue that offence under Section 138 of the said Act. Admittdly, in the present case no such Order under Section 21-A has been filed. In para 18 of the said Judgment the Supreme Court has categorically held that the provisions of the SICA do not create any

legal impediment for instituting proceedings in a criminal case on the allegations of an offence under Section 138 of the said Act against a company or its directors.

20. The learned Counsel appearing on behalf of the Appellant thereafter relied on a Judgment in the case of **Pankaj Mehra and another** v. **State of Maharashtra and others** (supra). He submitted that merely because the Accused was under legal disability to make the payment which was due and payable to the Complainant he would not be absolved from the penal liability for the dishonour of the cheque under Section 138 of the said Act. The question which is for consideration before the Supreme Court is whether the Company would escape from penal liability under the Act on the ground that the Petition for winding up of the Company had been presented and was pending during the relevant time. The Supreme Court answered the said question in the negative and after considering various Judgments held that merely because winding up of the Petition was pending in a Court the Company ors its Directors did not escape the penal liability which had arisen under the provisions of the said Act. There cannot be any dispute regarding the ratio laid down. However, in my view, in the present case the facts are entirely different and, therefore, the ratio will not be applicable to the facts of the present case.

21. The learned Counsel appearing on behalf of the Appellant further relied on a number of Judgments of the Supreme Court and other

High Courts in support of his contention that eventhough a cheque was given under security even then the liability under Section 138 was irresistible in such cases. He relied on a Judgment of the Supreme Court in **ICDS Ltd.** v. **Beena Shabeer and another**(supra). In this case, the husband of the Respondent had purchased a car under a hire-purchase agreement and the Respondent No. 1 had acted as a guarantor for her husband and towards part-payment in respect of the transaction the Respondent No. 1 had issued a cheque to the Finance Company which was subsequently dishonoured. The question which was raised in this case was whether a guarantor would be liable under the provisions of Section 138 particularly when there was no individual liability of the guarantor towards the Complainant and as such whether it could be said that the guarantor had issued a cheque for the purpose of discharging his debt or liability. In the said case, the Supreme Court while considering the two questions "any cheque" and "other liability" occurring in Section 138 observed that a case of guarantor would fall within the meaning of the term "other liability" and held that a guarantor was issued a cheque in order to make payment of the debt of the principal borrower would also be liable. There cannot be any dispute in the ratio laid down of these Judgments. However, the said ratio in my view will not be applicable to the facts of the present case. It is a case of the Accused that the cheque in question was issued in favour of the Complainant on a specific understanding that it will not be acted upon by the Complainant. The cheque, therefore, had not been issued by the Accused as a guarantor as was done by the Respondent in the case which was instituted.

22. The learned Counsel thereafter relied on a Judgment of the Kerala High Court in the case of **Gopi s/o Vasudevan Sudarsanan s/o Chackrapani and another** (supra). In this case a plea was raised by the Accused that the cheque was issued to cover the legal liability of a third person and that it was issued as a security. In the agreement which was exhibited between the parties an assurance was given that the cheque would be returned in case the amount which was due from the principal borrower will be repaid before a particular date. Since the amount was not paid by that date the cheque was deposited and ws dishonoured for want of time. The Kerala High Court in the facts of the said case observed that the issuance of a cheque to cover a legal liability of another person would still attract the penal provisions under Section 138 of the said Act. There cannot be any dispute regarding the ratio laid down in this case. However, the facts in the present case are not identical and differ in various aspects and, therefore, the ratio of this case will not be applicable to the present case. The learned Counsel thereafter relied on a Judgment of the Madras High Court in the case of **Palraj** v. **Lalchandh** (supra). In this case the Accused had borrowed a principal sum from the Complainant and when repayment was demanded the Accused issued a cheque which on presentation was dishonoured. When statutory notice was sent by the Complainant the Accused sent a reply stating that the cheque was issued as security in the chit transaction and, therefore, he was not liable under the provisions of the said Act. In the facts of the said case and after taking into consideration the oral and documentary

evidence which was brought on record the Madras High Court held that though the Accused has raised a defence that the cheque was issued as a security for the transaction the Court observed that the security must be enforceable in the event of non compliance of the conditions and that the Accused had received the chit amount in the second auction and, therefore, he was bound to pay the subsequent instalments every month for 23 months and, therefore, the security would become enforceable if the Accused had not complied with the payment of future subsciption. In my view, the facts of the present case are entirely different. In the case before the Madras High Court in a chit transaction it was agreed that the Accused would pay the remaining instalments even if he had got the benefit of the auction in the earlier months and in order to secure the subsequent instalments which would be due and payable the cheque was given as a security for the said instalments. It was not the case of the Accused that the said cheque was not meant to be acted upon irrespective of the fact whether the instalments were due and payable by the Accused. In the present case, the facts which have emerged from the cross-examination of P.W.1, Shirodkar and the examination-in-chief of the Accused and the documents which have been brought on record by the Accused that the cheque which was issued was not meant to be acted upon and this was a practice which was followed not only in respect of the cheque in question but had been followed for a long time and each cheque when it had reached the period when it would become invalid it would be renewed by issuance of a fresh cheque which would continue to be valid for a period of 6 months thereafter and all payments which were

due and payable during this period would be made by Demand Drafts or in cash and at no time the cheque was supposed to be deposited in the Bank. In my view, therefore, the ratio of this Judgment of the Madras High Court will not apply to the facts of the present case.

23. The learned Counsel appearing on behalf of the Appellant thereafter relied on a Judgment in the case of **M/s. Alsa Constructions and Housing Limited and another** v. **M. Mal Reddy**(supra). In this case the Memorandum of understanding was entered between the Complainant and the Accused by which an amount of Rs. 30,00,000/- loan was obtained and Promissory Note was executed and immovable property was also given as security. When the amount of loan was not repaid the Accused issued a cheque on 8-1-1998 towards the discharge of the loan amount. On behalf of the Accused the decision in **Balaji Seafoods Exports(India) Ltd.** v. **MAC Industries Ltd., 1999(1) CT 66** was relied wherein the Court held that since a blank cheque was issued Section 138 of the said Act could not be invoked. Distinguishing the said Judgment the Madras High Court in the said case observed that the cheque was not issued on the date on which the memorandum of understanding was executed and the cheque was not issued as security on the date on which the memorandum of understanding was executed but the cheque was issued subsequently since repeated demands were made by the Complainant to discharge the liability of loan and in the facts of the said case the Madras High Court held that the Accused was liable since the cheque was issued towards the discharge of the liability of loan. In my view, the ratio of this

Judgment will also not be applicable to the facts of the present case. From the evidence of P.W.1, Shirodkar, in cross-examination it has been clearly brought on record by the Accused that cheques were issued as a security from time to time right from the inception of the transactions between the Complainant and the Accused. Further, it was brought on record by way of admission which was made by P.W.1, Shirodkar that there was a running account between the parties and that initially cheque would be issued however payment will always be made by Demand Draft and on such payment being made the cheque would be returned and if such payment was not made then the cheque would be renewed before the expiry of 6 months. Therefore, the ratio of this Judgment will not apply to the facts of the present case.

24. The learned Counsel appearing on behalf of the Appellant thereafter submitted in reply to the submission made by the learned Counsel on behalf of the Respondents that eventhough the amount mentioned in the cheque is larger than the liability even then the penal provision of Section 138 of the said Act would be attracted. He relied on the Judgment of the Kerala High Court in the case of **P. V. Kochayippa** v. **P. N. Suprasidhaan Rajani Bhawan and another** (supra). In this case admittedly an amount of Rs.80,000/- was given by the Complainant to the Accused. Whereas the cheque which was issued two years thereafter was for an amount of Rs.1,00,000/-. It was contended on behalf of the Accused that in view of this admitted fact the cheque was incapable of creating a cause of action under Section 138. The learned Single Judge of

the Kerala High Court after interpreting the provisions of Section 138 and the facts of the said case observed that the difference in the amount was not very significant and possibly the difference of Rs.20,000/- represented the interest on the principal amount of Rs.80,000/- for two years and in the said context held that though the cheque was for a larger amount than the actual amount paid to the Accused still the penal provisions of Section 138 were applicable. But the facts in the present case are different. Therefore, the ratio of this Judgment will not be applicable to the facts of the present case. The learned Counsel, thereafter relied on the Judgment of the Andhra Pradesh High Court in the case of **Andhra Engineering Corporation** v. **M/s T.C.I. Finance Ltd.** (supra). In this case, the Accused had approached the Complainant Finance Company for a Bill Discounting facility and had executed an agreement for that purpose. The Accused after having availed the Bill Discounting facility for a particular amount failed to repay the said amount within the prescribed period. He thereafter issued a cheque towards the said amount and thereafter paid an amount of Rs.2,00,000/- and a further amount of Rs.50,000/- and Rs.1821/-. The cheque after its presentation was returned for insufficient funds. It is contended by the Accused that before the presentation of the cheque the amount which was liable to be paid was much less than the amount mentioned in the cheque and, therefore, the Accused was not liable. In the facts of this case, the Andhra Pradesh High Court came to the conclusion that after the payment of the subsequent instalments there was no dispute regarding the balance amount which was due and payable and, therefore, the cheque was valid for the said balance amount. The

Accused in the said case filed a Memo stating that he was having less than the balance amount to the credit of his account on the date of presentation of the cheque. The Court observed that since even the balance amount was not available in the account of the Accused he was clearly guilty of the offence punishable under Section 138 of the said Act. With respect I do not agree with the ratio which is laid down by the learned Single Judge of the Andhra Pradesh High Court moreover the said observation was made by the learned Single Judge after having discussed the facts and evidence on record in the said case. In any event, the facts in the present case are entirely different and, therefore, in my view, this Judgment cannot be accepted that even if the amount mentioned in the cheque is larger than the liability even then Section 138 will be attracted.

25. The learned Counsel appearing on behalf of the Appellant thereafter relied on a Judgment in the case of **R. Gopikuttan Pillai** v. **Sankara Narayanan Nair**(supra). In the said case, a cheque issued by the Accused towards the discharge of a legally enforceable liability was dishonoured. The Accused did not dispute that the cheque was issued by him. It was also admitted that an amount of Rs. 60,000/- was advanced by the Complainant for repairing his vehicle. The interest payable was also not disputed. It was contended by the Accused that various part payments were made after the cheque was issued and reliance was placed on the books of acccounts mentioned by him. It is a context of the said part payment which was made that the learned Single Judge of the Kerala High Court held that the part payment of the amount due and payable

before and after the date of receipt of the notice of demand under Section 138 would not absolve the Accused of its culpability. The learned Single Judge after considering the provisions of Section 138 held that the Accused would still be liable under the provisions of Section 138. The learned Single Judge observed as under:-

> "If the honouring of the cheque for the entire amount by the Bank were to result in any excess payments being made, civil remedy to claim return of the amount would be available to the drawer".

26. I am unable to agree with the said observations made by the learned Single Judge of the Kerala High Court, in any event the facts in the said case and the facts of the present case are entirely different. The case of the Accused as pleaded by him in his evidence and which have been brought on record in the cross-examination of P.W.1, Shirodkar was that the cheque was given by way of an arrangement between the parties and payment was never made by encashing the said cheque and that though the cheque was issued in the name of the Complainant the actual payments were made to IPCL which was the Company which manufactured the raw materials and supplied them to the Accused through the Company. The ratio, therefore, will not be applicable to the facts of the present case.

27. The learned Counsel appearing on behalf of the Appellant further relied on two recent Judgments of the Kerala High Court in the case of **M/s. General Auto Sales** v. **D. Vijayalakshmi(supra)** and **Assoo Hajee v. K. L. Abdul Latheef and another (supra).** In the first case the Accused and the Complainant had business dealings and the Complainant's ledger book disclosed a balance which was little less than the amount of the cheque and a blank cheque was issued by the Accused was filled up by the Complainant after the liability was determined. The learned Single Judge on the facts of the said case observed that the presumption which was raised under Sections 118 and 139 of the said Act had not been rebutted and under the circumstances held that the Accused was guilty of the offence. In the second case a blank cheque was issued as a security of the amount that had become due. The Complainant had contended that the entries were made on the cheque in the presence of the son of the Accused after verifying the accounts and this fact was not challenged by the Accused and under these circumstances it was held that the Complainant had proved the liability outstanding from the Respondent. In my view, the ratio of both these Judgments will not be applicable as the facts do not tally with the facts of the present case.

28. In my view, the Sessions Court was right on relying on a Judgment of this Court in the case of **M/s. Pawan Enterprises** v. **Satish H. Verma**(supra). The learned Single Judge of this Court has held in the said case that the cheque was issued by the Accused by way of security and not towards the discharge of any liability. The learned Single Judge has

observed that the liability and security are two different aspects and both could not be mixed or acted upon simultaneously. In the said case the Accused had purchased one Onida Colour T.V. from the Complainant for a total consideration of Rs. 22,760/- and had initially made down payment of Rs. 5000/- in cash and had issued post dated cheque for the balance amount of Rs. 17,745/-. It was brought on record that after the said cheque of the balance amount was paid the Complainant also received certain further amounts in cash by way of instalments. Under the circumstances, the learned Single Judge came to the conclusion that the cheque had been issued not for the purpose of covering the liability but it had been issued as a security for the balance amount. In my view, the ratio of the said Judgment will be squarely applicable to the facts of the present case. In the present case also it has come on record and in my view the Accused has successfully rebutted the presumption raised under Section 139 by bringing on record the admissions of P.W.1, Shirodkar that the cheques which were issued by the Accused were never deposited in the Bank and the arrangements between the parties which were admitted by P.W.1, Shirodkar himself were that payments were made by Demand Drafts and the cheque was invariably returned to the Accused. Therefore, the cheque which was issued was never issued for the purpose of encashment but was meant to be kept in safe custody. This is clear from the covering letter dated 29-12-1999 in which it has been mentioned that the cheque of Rs. 10,00,000/- was kept as a security though the outstanding bill was Rs. 8,00,000/- and that as soon as the funds were made available the dues of Rs. 8,00,000/- would be cleared. The admission

of the Acxcused that there was an existing liability, therefore, cannot be considered out of the context and it has to be taken into consideration in terms of the arrangement which was arrived at between the parties which itself has been admitted by P.W.1, Shirodkar.

29. There cannot be any doubt regarding the ratio laid down in **Modi Cements Ltd.** v. **Kuchil Kumar Nandi** (supra) and **Goa Plast(P) Ltd**. v. **Chico Ursula D'Souza** (supra) as also in the case of M. M. T. C. Ltd. v. Medchl Chemicals and Pharma(P) Ltd.((2002) 1 SCC 234. The interpretation, therefore, of the provisions of Section 138 will have to be made in the context, facts and circumstances of each case and accordingly it will have to be seen whether from the facts and circumstances of the said case offence under Section 138 is made out and whether the presumption which is raised under Section 139 is rebutted or not. In my view, in the facts and circumstances of the present case, the Accused has successfully rebutted the presumption which is raised under Section 118 r/w Section 139 of the said Act.

30. Apart from that, in my view, there is no reason to interfere with the finding recorded by the Additional Sessions Judge as it is well settled that the High Court while exercising its jurisdiction is not expected to substitute its own view to the view taken by the lower Court. In my view, it cannot be said that the finding of the lower Court is perverse or reasonable. In any event after having perused the entire evidence on record, I am of the view that there is no infirmity to the final Order and

the finding will be recorded by the Additional Sessions Judge. I do not see any reason to interfere with the said Judgment and Order.

31. In the result, the Appeal is dismissed. I must record my appreciation of the assistance given by the learned Counsel appearing on behalf of the Appellant and the Respondents and the research that a number of Judgments are cited in this case. The Appeal is accordingly dismissed.

V. M. KANADE, J.

RD.